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No. 503

# In the Supreme Court of the United States

OCTOBER TERM, 1960

DENVER CHICAGO TRANSPORT COMPANY, INC.,
APPELLANT

*v.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO*

## MOTION TO AFFIRM

J. LEE RANKIN,
*Solicitor General,*
ROBERT A. BICKS,
*Assistant Attorney General,*
RICHARD A. SOLOMON,
*Attorney,*
*Department of Justice, Washington 25, D.C.*

ROBERT W. GINNANE,
*General Counsel,*
FRANCIS A. SILVER,
*Associate General Counsel,*
*Interstate Commerce Commission,*
*Washington 25, D.C.*

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## MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

### STATEMENT

This is a direct appeal from a final judgment of a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. That judgment dismissed an action brought by appellant to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission construing the terms "petroleum prod-

ucts" and "liquid petroleum products" as used in various certificates of public convenience and necessity held by appellant as not including petroleum (hereafter "crude oil").

After various administrative proceedings (described in the Commission's opinion, J.S. 44–49), Division 1 of the Commission held (1) that the term "petroleum products" in appellant's certificates does not include crude oil, and (2) that the Commission did not intend, when it originally issued the certificates to appellant's predecessor, to authorize the transportation of crude oil. *Collett Tank Lines v. R. B. "Dick" Wilson, Inc.*, 78 M.C.C. 369 (J.S. 43–64). The Commission reviewed the evidence designed to show that appellant's predecessor had "grandfather" authority to transport crude oil, and that it therefore intended to seek, and the Commission intended to grant, such authority (J.S. 52–54, 57–58). It concluded (J.S. 58), however, that "[n]either the oral nor documentary evidence adduced to establish 'grandfather' rights for the transportation of crude oil shows specifically described operations for the [critical] period * * *," and that "the evidence does not establish that there was an intention on the part of the Commission, division 5, to authorize the transportation of crude oil in the 'grandfather' proceeding." The Commission rejected the contention that certain of its decisions established that "at the time [appellant's] certificates were issued * * * [the Commission] intended that grants of authority to transport petroleum products included the right to transport crude oil" (J.S. 60).

The full Commission denied reconsideration (J.S. 7), and the three-judge district court unanimously sustained the Commission's order. The court ruled (J.S. 30, footnotes omitted):

> After considering the evidence the Commission concluded that in the grant of the authorities here involved there was no intent to include the right to transport crude oil. The construction of a grandfather permit by the Commission is controlling on the courts unless clearly erroneous. Here, there is substantial evidence to sustain the construction by the Commission. Its determination of its own intent cannot be said to be clearly erroneous. That intent is consistent with the literal meaning of the language used.

## ARGUMENT

This case involves the narrow issue of the interpretation of appellant's motor carrier certificates. After extensive administrative proceedings, which included consideration of "grandfather" proceedings in which appellant's predecessor received the certificates, the Commission concluded that the term "petroleum products" does not cover crude oil and was not intended at the time of the original proceedings. As this Court has held, the Commission's determination of the scope of its own certificate will be upheld unless it is "clearly erroneous." *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558. The three-judge district court unanimously held that the Commission's construction of its own certificates "cannot

be said to be clearly erroneous" and, therefore, "must stand" (J.S. 30, 31). We submit that this decision is correct, and that this appeal presents no substantial question calling for plenary review by this Court.

Initially, we point out that "the plain meaning of words in a commodity description is controlling in the absence of ambiguity or specialized usage in the trade" (*Nelson, supra,* at 557). Appellant does not contend that there is anything "patently ambiguous" (*ibid.*) in the term "petroleum products"—the commodity description contained in its certificates—or that this phrase "is a term of art" (*id.*, at 558) in the trade which has come to mean crude oil. Indeed, it does not challenge (see J.S. 9) the statement of the district court that "[i]n the ordinary use of the English language there is a distinction between a commodity and the products of that commodity" (J.S. 25–26). Under *Nelson,* therefore, this alone would have been sufficient to sustain the Commission's ruling.

The Commission and the court, however, did not limit their consideration to the language of the certificates. In response to appellant's contention that a broader definition, including crude oil, had been intended by the agency at the time the certificates were issued, the Commission fully considered other Commission decisions and the record in the "grandfather" and subsequent authorization proceedings which, appellant alleged, supported its position. The Commission held, however, that there was no basis

for concluding that other contemporaneous Commission decisions demonstrated an intent to include crude oil within the meaning of the term "petroleum products"; and that neither the "grandfather" proceeding nor the eight subsequent certification proceedings involving the appellant's predecessor showed any such intent. The district court affirmed, finding that "there is no ground for concluding [from analysis of the other Commission decisions] that the Commission intended that a grant of authority to transport petroleum products included the right to transport crude oil" (J.S. 28), and that the Commission's construction of the "grandfather" permit and the subsequent authorizations was supported by substantial evidence (J.S. 30).

Appellant's principal reliance here, as below, is on the so-called *Classification* case (*Classification of Motor Carriers of Property*, 2 M.C.C. 703 (1937)), where the Commission included transportation of crude oil within the classification of "carriers of liquid petroleum products." But, as the district court held (J.S. 26–27), in upholding the Commission on this point (see J.S. 60), "a reading of the entire categorization" of "liquid petroleum products" (which includes "edible oils, coal-tar products, and chemicals," and expressly excludes "transportation of milk, fruit juices, or other perishable liquid products which require temperature control"), shows that the primary intent of the proceeding was, "to set up a grouping for regulation of tank vehicles, not to pro-

vide a definitive commodity description" (J.S. 26–27). Accord, *Carolina Freight Carriers Corp.* v. *United States,* 38 F. Supp. 549, 554 (W.D.N.C.), affirmed, 315 U.S. 475 ("* * * in making classifications of carriers for the proper performance of its [sic] duties, the Commission has not attempted to classify with respect to points served or specific commodities hauled, but has defined its seventeen classes of carriers on the basis of the general business engaged in"). See also *Willers* v. *United States,* 133 F. Supp. 270, 272 (S.D.); *Humes Extension of Operations—Indiana,* 48 M.C.C. 455; *Vaughn Interpretation of Certificates,* 52 M.C.C. 204.

Both the Commission (J.S. 60–62) and the district court (J.S. 27–28) recognized that there was some inconsistency in the use of the term "liquid petroleum products" in a number of certificates. But, as the court indicated (J.S. 28), while this inconsistency may have been sufficient to warrant investigation into the specific intent of the grants to appellant's predecessor, the limited number of certificates incorporating language which could be read to indicate an intent to include crude oil within the category of petroleum products, did not involve cases in which the Commission itself had been called upon to consider the coverage of the grant. Accordingly, these cases provided "no ground for concluding that the Commission [here] intended that a grant of authority to transport petroleum products included the right to transport crude oil" (*ibid.*).

Nor is there any merit to appellant's attack upon the Commission's analysis of the "grandfather" proceeding and the eight extension applications which followed it. Appellant does not really challenge the Commission's conclusion that, regardless of the *applicant's* intent, there was no showing made in those proceedings to justify the grant of authority to carry crude oil, or other indication that the *Commission* intended to authorize such carriage. Instead, it appears to argue (J.S. 17–19) that the evidence at the reopened hearings in those proceedings was insufficient to support an affirmative conclusion by the Commission that appellant's certificates, at the time they were issued, "were not intended and understood to authorize the transportation of crude oil" (J.S. 19). This misses the point. Since the language of the certificates in its normal usage admittedly would not include "crude oil," the purpose of resort to the earlier authorization proceedings was to give appellant an opportunity to show, as it clearly has not, that the Commission in making the awards intended to authorize the broader coverage. *Nelson* v. *United States, supra,* at p. 557. In any event, as the court below held (J.S. 30), there was "substantial evidence" to support the Commission's conclusion that in granting these authorizations it had not intended to include a right to transport crude oil, and

that this "determination of its own intent cannot be said to be clearly erroneous."[1]

Where a statutory three-judge court, as here, has confirmed a Commission construction of the intended scope of the certificates, further plenary review by this Court is seldom, if ever, warranted. See *Sims Motor Transport Lines, Inc.* v. *United States*, 362 U.S. 637, affirming 183 F. Supp. 113 (N.D. Ill.); *Burlington-Chicago Cartage, Inc.* v. *United States*, 362 U.S. 401, affirming 178 F. Supp. 857 (S.D. Ill.). Cf. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401; *Nelson* v. *United States of America, supra.* Here, as in *Nelson* (355 U.S., at 560), "we are compelled to think the Commission right; certainly it is not clearly wrong."

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[1] Appellant, while attacking the district court's use of the clearly erroneous test, appears to agree it "did not unduly prejudice Appellant" (J.S. 20). In any event, the purported distinction between an "interpretation" of a certificate (to which the clearly erroneous test would be applicable under *Nelson, supra*) and findings of fact which must be supported by substantial evidence, breaks down because, contrary to appellant's contention (J.S. 21), the district court did find that there is substantial evidence to support the Commission's findings (see J.S. 30). Appellant also argues that the Commission here has in effect revoked its certificated rights without following the procedure specified in 49 U.S.C. 312(a). But this Court has made clear that "Commission interpretation of the meaning of a permit, being simply a definitive declaration of what rights existed from the very beginning under the permit, cannot be equated with modification, * * * unless found to be clearly erroneous." *Andrew G. Nelson, Inc.* v. *United States, supra*; 355 U.S. at 558–559, n. 4; see also, *Jones Truck Lines* v. *United States*, 146 F. Supp. 697, 703 (W.D. Ark.); *Willers* v. *United States, supra.*

## CONCLUSION

For the foregoing reasons, we submit that the decision below is correct and that this appeal presents no substantial questions. The judgment of the district court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
*Solicitor General.*

ROBERT A. BICKS,
*Assistant Attorney General.*

RICHARD A. SOLOMON,
*Attorney.*

ROBERT W. GINNANE,
*General Counsel,*

FRANCIS A. SILVER,
*Associate General Counsel,*
*Interstate Commerce Commission.*

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